Supreme Court, U.S.
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No. 86-1376

In The
Supreme Court of the United States
October Term, 1986

A.G. BECKER INCORPORATED,
Petitioner,

vs.

FIRST BISCAYNE CORPORATION, STEVEN J. HURTIG and IRENE S. GREENSTEIN, as Trustee under Trust Document Dated February 22, 1968,
Respondents,

MELVYN GREENSTEIN,
Third-Party Respondent.

RESPONDENT IRENE S. GREENSTEIN'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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STATUTES

Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) ..... *passim*

DEFINITIONS

1. Petitioner, A.G. Becker Incorporated, shall be referred to as "Becker".

2. Respondent/Plaintiff below, Irene S. Greenstein, as Trustee under Trust Document dated February 22, 1968, shall be referred to as "Greenstein".

3. Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), shall be referred to as "Section 10(b)".

REASONS FOR DENYING THE WRIT

Becker's argument on the merits does not belong in a petition for writ of *certiorari*. Moreover, its contentions are without merit. The Eleventh Circuit's decision rests upon sound reasoning and public policy in favor of upholding the right of access to the courts. *Wolfe v. E.F. Hutton & Company, Inc.*, 800 F.2d 1032 (11th Cir. 1986) (*en banc*). The "recent pronouncements" of this Court upon which other circuit courts have based their conflicting opinions actually are nothing more than *dicta*. At the time the appellate court considered the appeal in this case, the rule in the Eleventh Circuit was that agreements to arbitrate disputes under Section 10(b) were unenforceable and this Court still has not held otherwise. Therefore, the appellate court was correct in following precedent and reversing the district court's order compelling arbitration.

Greenstein does not dispute that there is a conflict among the circuit courts of appeals as to whether claims arising under Section 10(b) are subject to arbitration. However, even Becker acknowledges that the question presented by it already is before this Court in *McMahon v. Shearson/American Express, Inc.*, No. 86-44. Therefore, it is unnecessary for *certiorari* to be granted in this case and Becker's petition must be denied.

Greenstein raised two other grounds for reversal of the district court's order in addition to her argument that the arbitration agreement was unenforceable under the law of the Eleventh Circuit. Greenstein's second point on appeal was that the parties did not agree to arbitrate claims under the securities laws because the law at the

time the contract was executed prohibited enforcement of such agreements and the contract must be interpreted in that posture based on the presumption that parties enter into an agreement in contemplation of the applicable laws in existence at the time of the contract. *See, e.g., Morgan Stanley & Co., Incorporated v. Archer Daniels Midland Company,* 570 F. Supp. 1529, 1541-42 (S.D.N.Y. 1983). Greenstein's third point on appeal was that Becker waived its right to enforce the arbitration clause by waiting until the eve of trial to invoke it. This action was pending for three years and was twenty days away from trial when Becker moved to compel arbitration. During that three-year period, Becker took a position entirely inconsistent with enforcement of the arbitration clause by actively engaging in discovery and other pre-trial proceedings and filing counterclaims, crossclaims, third party claims and a pre-trial stipulation. At no time prior to the motion which is the subject of this petition was the arbitration clause raised by way of defense, motion or otherwise. Based on those facts, Greenstein contended that Becker waived its right to compel arbitration.

The Eleventh Circuit's opinion was silent as to those issues. (See Appendix B to Becker's Petition) In the event *certiorari* is granted, Greenstein respectfully requests that the issues raised by her second and third points on appeal be considered as well.

———o———

CONCLUSION

For the foregoing reasons, Becker's petition for a writ of *certiorari* must be denied. In the event the petition is granted, Greenstein respectfully requests this Court to consider all issues raised by her in her appeal to the Eleventh Circuit Court of Appeals.

DATED: Miami, Florida
April 30, 1987

Respectfully submitted,

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